IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,

Appellants,

vs.

THE UNITED STATES.

No. 567.

MOTION OF EVENS & HOWARD FIRE BRICK COMPANY AND UNION SAND & MATERIAL COMPANY TO CONSOLIDATE CAUSE No. 567 AND CAUSE No. 572 WITH CAUSE No. 452, AND TO ADVANCE HEARING OF No. 567 AND No. 572, TO BE HEARD CONJOINTLY WITH No. 452.

JOHN F. LEE,
GEORGE M. BLOCK,
Solicitors for Evens & Howard Fire Brick Company and Union Sand and Material Company, Appellants.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1513.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants,
vs.
THE UNITED STATES.
No. 567.

NOTICE.

To the United States of America and to the Terminal Railroad Association of St. Louis:

You will take notice that on the 12th day of October, 1914, the Evens & Howard Fire Brick Company and the Union Sand & Material Company will file with, and present to, the Supreme Court of the United States a motion to consolidate the appeals in Cause No. 572 to the October Term, 1914, and Cause No. 567 to the Oc-

tober Term, 1914, with Cause No. 452 to the October Term, 1914, and to advance said Cause No. 567 and said Cause No. 572 so that all three appeals may be heard jointly on the 12th day of October, 1914.

John F. Lee

Lee & Black

Solicitors for Evens & Howard Fire Brick Company and Union Sand & Material Company.

Service of the foregoing notice, with a copy of the motion to consolidate and advance, and the argument in support thereof, is hereby acknowledged, this..... day of September, 1914.

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OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants,
vs.
THE UNITED STATES.
No. 567.

MOTION OF EVENS & HOWARD FIRE BRICK COMPANY AND UNION SAND & MATERIAL COMPANY TO CONSOLIDATE CAUSE No. 567 AND CAUSE No. 572 WITH CAUSE No. 452, AND TO ADVANCE HEARING OF No. 567 AND No. 572, TO BE HEARD CONJOINTLY WITH No. 452.

Now comes Evens & Howard Fire Brick Company and Union Sand & Material Company and show to the Court that on April 22, 1912, this Court rendered an opinion

in case of United States of America, appellant, v. Terminal Railroad Association of St. Louis *et al.*, which opinion is reported in 224 U. S. Supreme Court Reports, page 383; that pursuant to the opinion and mandate of this Court, the Circuit Judges of the Eighth Circuit, sitting in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, did, on the 2nd day of March, 1914, enter a final decree in said cause; that on the 27th day of March, 1914, the United States of America took an appeal in said cause for the purpose of obtaining a change and modification of said final decree, alleging in its assignment of errors that said decree as entered was not in accordance with the opinion rendered by this Court on April 22, 1912; that the appeal taken by the United States of America was docketed in this court and numbered "1023" to the October Term, 1913, but is now numbered 452 to October Term, 1914, and has been advanced and set for hearing on the 13th day of October, 1914, in this court; that on the 28th day of March, 1914, the Terminal Railroad Association of St. Louis, defendant, filed a motion in said cause to modify said final decree, which motion was overruled, and on the 20th day of June, 1914, the said Terminal Railroad Association appealed from the order of the District Court overruling said motion to modify said final decree to this Court; that said appeal has been perfected, said cause has been docketed, and is numbered Cause No.

572 to the October Term of this Court; that on the 12th day of April, 1914, the Evens & Howard Fire Brick Company and the Union Sand & Material Company filed a motion in said cause asking leave to intervene and praying a modification of said final decree, and on June 20, 1914, said petition and motion was by the said District Court denied, and the relief therein prayed refused; whereupon, petitioners, Evens & Howard Fire Brick Company and Union Sand & Material Company, duly perfected their appeal to this Court and said appeal has been docketed in this Court and is numbered Cause No. 567 to the October Term of this Court. Petitioners state that the counsel for the Terminal Railroad Association have notified counsel for petitioners that it is their intention to move this Court that its appeal—being Cause No. 572 to the October Term, 1914, of this Court—be consolidated with Cause No. 452 to the October Term, 1914, of this Court—being the appeal of the United States in the same cause; and that the appeal taken by petitioners—being Cause No. 567 to the October Term, 1914—be also consolidated with said Cause No. 572 and said Cause No. 452 to the end that all questions involved in said three appeals may be settled and adjudicated at one and the same time.

Wherefore, the premises considered, the Evens & Howard Fire Brick Company and the Union Sand & Material Company do hereby move this Court that an order be entered herein consolidating said Cause No. 567

to the October Term, 1914, and said Cause No. 572 to the October Term, 1914, with said Cause No. 452 to the October Term, 1914, and that said Causes No. 567 and 572 be advanced and set for hearing and argument on the 13th day of October, 1914, the day on which Cause No. 452 is set for hearing; and, for the grounds of this motion, the Evens & Howard Fire Brick Company and the Union Sand & Material Company say that all three of said appeals involve the interpretation and construction of the decision of this Court, rendered in the case of United States of America, Appellant, v. Terminal Railroad Association of St. Louis *et al.*, on the 22nd day of April, 1912; that all three of these causes involve the determination of the correct meaning of said decision and as to whether or not the final decree entered in said cause by the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri has complied with the mandate and decree of this Court; that each of the appellants in said three causes is contending for a different construction as to the correct meaning of said decision of this Court, and that each of said appellants is seeking a modification of said final decree in some particular vitally affecting its interests and directly at variance with the form of the decree as contended for by the other appellants; that any ruling made by this Court upon any one of said appeals without giving the other appellants an opportunity to be heard might work a great injustice and

wrong to the appellant not so heard; that the questions involved in said three appeals are so intimately connected and so intimately involved one with the other that it is essential to right and justice that said three appeals be heard at one and the same time; that it will lessen the work and labor of this Court if said appeals be consolidated and heard at one time, and such consolidation will greatly aid and assist this Court in the discharge of its work and labor in connection with the decision of the questions involved in said three appeals, and appellants respectfully state to the Court that a copy of this notice and motion has been duly served upon the counsel representing all of the adverse parties.

Respectfully submitted,

John F. Lee

Solicitors for Evens & Howard Fire Brick Co. and Union Sand & Material Co., Appellants.

IN THE

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED
SEP 17 1914
JAMES D. MAHER
C. F.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
Appellants,
vs.
THE UNITED STATES.
No. 567.

STATEMENT, BRIEF AND ARGUMENT OF APPELLANTS.

JOHN F. LEE,
GEORGE M. BLOCK,
Solicitors for Appellants.

St. Louis Law Printing Co., Printers' Bldg., Ninth and Walnut. Bell, Main 1819.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

EVENS & HOWARD FIRE BRICK COMPANY and UNION SAND & MATERIAL COMPANY,
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vs.

THE UNITED STATES.

No. 567.

STATEMENT.

On April 22, 1912, this Court rendered an opinion in the case of United States of America, appellant, v. Terminal Railroad Association of St. Louis *et al.*, defendants, which opinion is reported in 224 U. S. Supreme Court Reports, page 383. Pursuant to the opinion and mandate of this Court, the Circuit Judges of the Eighth Circuit, sitting in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, did, on the 2nd day of March, 1914, enter a final decree in said cause. On the 12th day of April, 1914, appellants filed a motion in said cause ask-

ing leave to intervene and praying a modification of said final decree, thereafter fifty-three other parties, similarly situated as are appellants, and with the same rights involved, also filed supplemental petitions asking leave to intervene in said proceeding. On June 20, 1914, the said Circuit Judges, sitting as a District Court in said original cause, entered an order, under and by the terms of which appellants were granted leave to file their intervening petitions and leave was also granted to file the supplemental petitions of said fifty-three other interveners, but the prayers of the appellants and of said supplemental petitioners for leave to intervene and for the relief prayed therein were, by said order, denied, to which order denying appellants the right to intervene and denying the relief prayed for, appellants duly excepted, and this appeal is taken from said order of the District Court, so entered on the 20th day of June, 1914.

In said original cause—United States of America, complainant, v. Terminal Railroad Association of St. Louis *et al.*, defendants—the United States of America took an appeal to this Court on the 27th day of March, 1914, the purpose of said appeal, according to the assignment of errors, being to obtain a modification and change of the terms of the said original decree; and, on the 28th day of March, 1914, the Terminal Railroad Association of St. Louis filed its motion in said original cause, praying for a modification of said decree, which

motion was, on the 20th day of June, 1914, denied, and on the 20th day of June, 1914, the Terminal Railroad Association of St. Louis also took an appeal in said original cause to this Court from the order of the District Court denying its motion to modify said final decree. The appeal of the United States of America, taken on the 27th day of March, 1914, in said cause, has been advanced and, by order of this Court, the hearing of this appeal has been set for the 13th day of October, 1914. Motions have been made by these appellants and the Terminal Railroad Association of St. Louis to consolidate this appeal of the Evens & Howard Fire Brick Company and the Union Sand & Material Company, and the appeal of the Terminal Railroad Association of St. Louis, with the said appeal of the United States of America, and to advance the hearing of the appeal of the Evens & Howard Fire Brick Company and the Union Sand & Material Company and the Terminal Railroad Association so that the same may be heard by this Court on the 13th day of October, 1914, at the same time that the appeal of the United States of America heretofore taken in the same cause is heard by this Court.

The relief prayed for by appellants is a modification of the original decree, entered in said original cause, which will "permit the Terminal Railroad Association of St. Louis to receive and transport from any person, firm or corporation cars, loaded or unloaded, at any

point, on its terminal lines and move same to any other point on its said terminal lines and there deliver same to any person, firm or corporation, even though the moving thereof from said initial point to said delivery point be entirely over the lines of the Terminal Railroad Association".

The Terminal Railroad Association of St. Louis is an organization composed of substantially all the terminal units which formerly supplied terminal and switching facilities to the City of St. Louis. The history of its organization is so fully set out in the opinion rendered by this Court in United States v. Terminal Railroad Association, 224 U. S. 383 (56 Law Ed. 810), and this Court is so familiar with the history of the organization that we simply refer to that opinion for the details of such organization. At the present time said Terminal Association embraces by far the greater portion of the terminal facilities which supply terminal and switching facilities to the City of St. Louis. Many of the constituent units which go to form the present Terminal Association consist of terminal railroads organized under the general railroad laws of the State of Missouri. (See 224 U. S., *l. c.* 407, and State *ex inf.* v. Terminal Railroad, 182 Mo., *l. c.* 293.) In addition, many, if not all, of the constituent units which compose the Terminal Association obtained their rights over the streets of the City of St. Louis under ordinance grants which impose contractual obligations upon them of the following na-

ture, for instance: The St. Louis Transfer Railway,—one of such constituent units,—obtained its rights over the streets of the City of St. Louis under Ordinance No. 12975, approved June 11, 1884, Section 2 of which ordinance provides as follows:

> "That said St. Louis Transfer Railway Company **shall transfer and switch, or pull to or from any transfer boat, and connecting lines and switches,** cars for all persons and companies along the line hereby authorized, at equal rates, **and its charges** for switching, including such pulling to and from said boats and connecting lines and switches and return of all empty cars, **shall not exceed one dollar per car** over any portion of the route between Arsenal street and the switches of the St. Louis Water Works."

And the St. Louis Merchants Bridge Terminal Railway Company, another constituent unit of said association, obtained its right to operate over the streets of the City of St. Louis under Ordinance No. 14078, approved July 9, 1887, which ordinance in Section 6 thereof provides as follows:

> "The said St. Louis Merchants Bridge Terminal Railway Company, its successors or assigns, **shall receive from any other railroad company, persons, firm or corporation and deliver to any other railway company, person, firm or corporation that shall hereafter have connection with its tracks,** within the City of St. Louis, including the return of the

empty cars free of charge, **any and all cars loaded**; and also shall receive from any railway company, person, firm or corporation that shall hereafter have connection with its tracks, within the City of St. Louis, including the return of the empty cars free of charge, and deliver the cars to any other railway company, person, firm or corporation that shall hereafter have connection with its tracks, including the return of the empty cars free of charge; as also to receive in carload lots of freight from any person, firm or corporation that shall hereafter have connection with its tracks, and transfer the car to any person, firm or corporation that shall hereafter have connection with its tracks, including the return of the empty cars free of charge; **for which service it may charge therefor a sum of money not to exceed one dollar for each car so transported** to any station, initial or terminal point on the line of its railway within the limits of the City of St. Louis. * * *"

The Terminal Association has established and maintains what is known as "switching limits at East St. Louis and St. Louis", being the territory covered by its lines, within which it has always moved cars from any one point to any other point on its lines as a switching service. A map of this "switching limit" is herewith filed showing all lines of the Terminal Association marked thereon in red, and also showing all industrial plants located thereon at time the map was published.

The tracks of the Terminal Association cover an area of about one hundred square miles, and while its main

business is that of furnishing terminal facilities to the proprietary railroad lines, yet incidental to that, ever since its organization it has been furnishing switching facilities to the business industries which are located at various points in and about the City of St. Louis on its various lines, or at any point on the lines within said "switching limits", which service has always consisted of moving cars from the plant of any such industry to some other plant of the same industry, or to some customer of such industry located in said "switching limits". Depending upon such service, an immense number of industries have been located upon the lines of the Terminal Association at various points in the City of St. Louis and elsewhere in said "switching limits", all of which industries are wholly dependent in many instances upon the Terminal Association for the movement of its products from the manufacturing or producing plant of such industry to other plants of the same industry or to its various customers, likewise located upon the tracks of the Terminal Association; and, in many cases, the location of the industries is such that the movement of the product of the industry to its other plant or to its customer is wholly over the tracks of the Terminal Association. During the year 1913 there were five hundred twenty-one industries so located on the tracks of the Terminal Association who shipped during the year 1913 over thirty thousand loaded cars to various other plants, persons and industries also located on

the lines of the Terminal Railroad Association where the movement of the cars was entirely over the lines of the Terminal Association; but the movement of these thirty thousand loaded cars, while entirely over the lines of the Terminal Association, was not competitive with any railroad constituting one of the proprietary lines in said Terminal Association nor was it competitive with any other railroad. In addition to this, the movement of these thirty thousand loaded cars was entirely intrastate. (See Record No. 567, pp. 23, 24 and 27 and see Record No. 572, pp. 24 to 32.)

The Evens & Howard Fire Brick Company has erected a plant at the cost of half a million dollars, for the manufacture of fire brick and other kindred products, on the line of the Terminal Railroad Association, where it employs a large number of persons. About five miles distant on the line of said Terminal Association it has opened clay banks from which it obtains its entire supply of clay with which to operate its plant, and owns its own cars in which to carry the clay from said mine to said plant. The Terminal Association is moving the clay from the mine to the manufacturing plant, and this business amounts to not less than two thousand loaded cars per year. This movement is entirely over the lines of the Terminal Association, but is not competitive with any railroad constituting one of the proprietary lines of said association or with any other railroad and is entirely intrastate business; and,

without the movement of this freight by the Terminal Association, the brick company must necessarily close down its plant and be subjected to irreparable loss. (See Record No. 567, pp. 22, 23 and 24.)

The Union Sand & Material Company has an elevator plant at the foot of Tyler street, in the City of St. Louis, located on the line of the Terminal Association. At this plant all of the sand which it produces for the use of the City of St. Louis and the surrounding territory is elevated and loaded into cars, and it has erected and constructed an elevator plant at this point at a large cost to it, and it owns and uses over 300 cars in moving and delivering its sand from this plant. It has a yard at Bremen avenue for supplying North St. Louis, and a yard at Natural Bridge road for supplying the northwestern portion of the City of St. Louis; and it also supplies a large amount of sand to various industrial plants and factories located on the tracks of the Terminal Association. During the year 1913 there was moved for the Union Sand & Material Company by the Terminal Association from the Tyler street plant to the Bremen Avenue yard and to the Natural Bridge Road yard, and to said industrial plants, over four thousand loaded cars. This movement was entirely over the lines of the Terminal Association, but was not competitive with any other railroad constituting one of the proprietary lines in said association or with any other railroad, and was entirely intrastate business; and, without the move-

ment of the product of the sand company by the Terminal Association from the Tyler Street plant to the other yards and industrial concerns, above set out, it would be impossible for the sand company to supply its sand to the northern or northwestern parts of the City of St. Louis, as to move its said product in any other way than by loaded cars moved over rails would make the cost prohibitive. (See Record No. 567, pp. 25, 26 and 27.)

On the 2nd day of March, 1914, the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in the case of United States of America v. The Terminal Railroad Association of St. Louis *et al.*, entered a final decree in which section 1 on page 2 of said decree read as follows:

> "The defendants are therefore perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association, or any of its constituent companies, and from operating any of the properties belonging to it or its constituents, **otherwise than as terminal facilities for the railroad companies using the same.**"

Said section 2 of said decree further provides that the Terminal Association may continue as a lawful unification of terminal facilities "**upon abandoning all operating methods and charges as and for railroad transportation** and confining itself to the transaction of a terminal business **such as supplying and operating**

facilities for the interchange of traffic between railroads". Clause 7 of said final decree specifically provided "this cause is reserved for such further orders and decrees as may be deemed necessary".

After appellants had filed with the Court, on April 12, 1914, their intervening petitions in said original cause—United States of America, complainant, v. The St. Louis Terminal Railroad Association of St. Louis *et al.*, defendants—fifty-three other persons, corporations and industries who stood in like position to the appellants in regard to the movement of freight and business over the Terminal Railroad Association, and who would be affected in the same way by the final decree theretofore entered in said original cause, filed supplemental petitions of intervention substantially similar to the petitions of appellants and asked to be heard upon the motions theretofore filed by these appellants; and these fifty-three parties (not including appellants) represented a movement of freight aggregating 10,299 loaded cars for the year 1913, or, including appellants' loaded cars, said movement of loaded cars for the year 1913 amounted to 16,299 cars. (See Transcript of Record No. 567, pp. 23, 27, 29 and 30.)

Appellants at no time had any knowledge or information that any such question was involved in said cause or that any question of the legality of the movement of their traffic from one point on the Terminal Association tracks to the other was involved, and the

first information they received as to the nature and terms of the final decree as entered in said cause was obtained from the public press on or about the 1st or 2nd of April, 1914 (see Rec. No. 567, pp. 23 and 26). As very grave and irreparable injury would be done to appellants if by the terms of the decree entered in said cause the Terminal Association were precluded and enjoined from continuing to move cars for them from one point on the Terminal Railroad Association's lines to another, appellants at once filed their petition in said cause praying the Court that the final decree theretofore entered in said cause might be so altered, amended and changed as not only to permit the Terminal Railroad Association to continue to perform such services for appellants as said association had been rendering appellants in the past by moving its cars from one point on the line of the Terminal to another point on the line of the Terminal (even though the moving thereof from said initial point to said delivery point be entirely over the lines of said association), and also praying that said decree might be made so clear and plain that appellants and others substantially similarly situated might be entitled to demand and require of said association the moving of cars from one point on the lines of said association to other points on said lines (even though the moving of said cars be entirely over the lines of said association), and that appellants and others similarly situated might be placed in a position

where such duty on the part of said association might be enforced by them should such service be at any time declined or refused by said association; said motions duly verified, being filed with the Court on April 12, 1914. (See Record, Case No. 567, p. 31.)

ASSIGNMENT OF ERRORS.

The District Court erred in denying appellants the right to intervene and the relief prayed for in their petition.

BRIEF.

I.

The Court should have granted appellants the right to intervene and the relief prayed for in their petition.

Equity Rule No. 37.

II.

Appellants were entitled to appeal from the order of the Court denying them the right of intervention and the relief prayed for in their petition.

Leary v. United States, 224 U. S. 567, 56 Law Ed. 889;
Foster on Federal Practice, p. 840;
Minot v. Mastin, 95 Fed. 734;
United States v. Phillips, 107 Fed. 824;
In re Columbia Real Estate Co., 112 Fed. 643;
United States Trust Co. v. Chicago Terminal R. R. Co., 188 Fed. 292.

III.

Under the broad terms of the new equity rule 37, appellants, upon the showing made in their petitions, would undoubtedly be permitted by this Court to intervene in this Court; and certainly in an equitable proceeding, such as this proceeding is, even if they had not intervened below, would, upon the showing made

of their interest in the cause, be permitted by this Court to appear, either by counsel directly representing them in the proceeding, or by counsel appearing as *amicus curiae*.

ARGUMENT.

Poimt I.

So far as the equity rulles adopted by this Court apply, they are the controllling authority upon points of practice. Rule 37, entitled "Parties Generally—Intervention", is an entirely new rule adopted by this Court for the first time in 1912. The power to make these rules is expressly delegated to, and conferred upon, this Court by the statutes of the United States. The purpose of this Court im formulating the new rules of equity practice was, as we understand it, to simplify proceedings, to avoid technicalities, to facilitate the administration of justice, andl to embody in these rules methods of procedure which the Court, from its long experience, had learned to be beneficial. The reports are full of decisions where parties have been deprived of their equitable rights and greatly embarrassed in obtaining justice by reason of technical decisions on the question of the right of intervention. Hence, when this Court adopted Rule 37, and in the last paragraph thereof provided as follows: "**Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention,** but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding"—the Court meant

to lay down the broad principle that in equitable proceedings the rights of a third person should not be emasculated and destroyed without giving that person the right to be heard. The right to intervene is laid down in the broadest terms. It could not be made broader—"**Any one** claiming an interest in the litigation may **at any time** be permitted to assert his right by intervention". There is no limit put upon the time when intervention may be made. Of course, we concede that the party desiring to intervene must not have been guilty of laches, but must act promptly as soon as he ascertains that litigation is pending which may vitally affect his interests, but to which litigation he is not a party. In the case at bar the record shows that appellants first learned that their interests were in jeopardy on the 1st or 2nd of April, 1914 (see Printed Record, No. 567, pp. 23 and 26). They at once prepared and filed with the District Court, on April 12, 1914, their petitions of intervention and for a modification of the decree (see Printed Record, No. 567, p. 31), hence there was no laches on their part.

So far as our research goes, there has been no judicial construction of the force, effect and meaning of Equity Rule 37, but, in our opinion, the rule is so plain and so clear that there can be but one interpretation placed upon it and that is, that in the administration of equity the Courts will permit "**any one** claiming an in-

terest in the litigation **at any time** to assert his rights by intervention".

In the case at bar the record shows that the interests of appellants are vitally affected; that no harm can come to any party to the litigation by granting to the appellants the relief prayed for; that to refuse this relief is to do irreparable injury not only to these appellants but to 519 other industries similarly located (see Printed Record, No. 567, pp. 23 and 27 and Printed Record, No. 572, pp. 24 to 32), and that, too, without appellants ever having been granted a day in court or having been heard in their own protection. Such a result a Court administered upon the broad principles of equity will never permit.

Point II.

The record in this case shows that a denial of the right to appellants to intervene, and a refusal to grant appellants the relief prayed for in their petitions of intervention, is a practical denial of all relief to appellants who have no other means of redress, because, unless the final decree of the District Court is amended, as prayed in the petitions of appellants, the decree becomes absolutely final and binding upon all parties to the suit, and the Terminal Railroad Association will thereafter be absolutely precluded from performing its ordinance and charter obligations to the appellants and others sim-

ilarly situated, and there will be no means by which the question can thereafter be opened. On the question of appeal from an order denying intervention and granting the relief prayed for, Foster on Federal Practice, at page 840, says:

> "Where a denial of the right to intervene is a practical denial of all relief to the petitioner, who has no other means of redress, an appeal will lie from an order denying intervention."

In Minot v. Mastin, 95 Fed. 734—a Circuit Court of Appeals decision of the Eighth Circuit—Thayer, J., in deciding this case, laid down the proposition that where the rights of the intervener are wholly unaffected by the proceedings, or where his rights, whatever they may be, are subordinate to the rights of the parties to the proceeding, or where there are other adequate remedies within his reach and at his disposal, then the right of intervention is discretionary; but that there were other cases where the rights of a third party to intervene in a pending case were so imperative and resting on grounds of necessity and the inability of the party to obtain relief by other means, that the right of appeal cannot be said to be dependent upon judicial discretion.

In the case of United States v. Phillips, 107 Fed. 824—a Circuit Court of Appeals decision for the Eighth Circuit—a case decided by the same Judges as decided 95 Fed. 734, the Court said:

> "This Court has held that there are two kinds of interventions. To the one class belong those cases in which the Court or Chancellor to whom the application is made is not bound to permit a third party to intervene and load the case with collateral issues, and in which the allowance of an intervention is entirely discretionary with the chancellor. To the other class of cases belong those in which the right to intervene is absolute, resting, as it does, upon the ground of necessity and the inability of the intervener to obtain such relief as he is entitled to by any other means than by intervention. Minot v. Mastin, 95 Fed. 734."

In *In re* Columbia Real Estate Company, 112 Fed. 643—a decision by the Circuit Court of Appeals of the Seventh Circuit—the Court recognized this same distinction and held that while a right to appeal from an order denying intervention did not exist, where the right to intervene was discretionary with the Court, that nevertheless an exception existed, saying:

> "A just exception to this rule arises where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervener is fairly entitled and which he can obtain only by intervention, and where the intervention is not discretionary with the chancellor."

In addition to the above there is one decision by this Court which seems to us to be conclusive on this proposition, and that is the case of Leary's Administratrix

v. United States, 224 U. S. 567, 56 Law Ed. 889. In that case the petition for leave to intervene was denied by the District Court. Intervener appealed to this Court and this Court sustained the appeal, sustained intervener's right to intervene, reversed the case, and directed that leave to intervene be granted to petitioner.

In United States v. Chicago Terminal R. R. Co., 188 Fed. 292 (C. C. A. decision) the Court says application to intervene are of two kinds. One where the applicant has other means of redress open to him, and there it is within the Court's discretion to refuse to encumber the main case with collateral inquiries. The other where the applicants' claim of right is such that they can never obtain relief unless it be granted in the pending case on intervention, and here the right to intervene is absolute and rejection of the petition is a final adjudication and appealable.

Point III.

The questions involved in all of said three appeals turn upon the proper construction and interpretation to be placed upon the decision of this court in the case of United States of America v. Terminal Railroad Association *et al.*, reported in 224 U. S., page 383, and the form of the decree to be entered under said opinion and the mandate accompanying the same. To us the opinion seems clear and the form of decree to be entered thereunder to be specifically set forth in said

opinion (see 224 U. S., *l. c.*, page 411, where this court stated the seven propositions to be covered by the decree to be entered in this case by the District Court). The District Court, in preparing the decree, embraced the seven propositions directed to be embraced therein by this court in its said opinion, but they also added an eighth point embracing a proposition not directed to be embraced in said decree by the opinion of this court, and in nowise called for by the terms of said opinion (see Printed Record No. 567, page 15). This eighth point, so included in said decree, is that part of said final decree which, according to our interpretation thereof, enjoins and prohibits the Terminal Railroad Association from receiving from any person, firm or corporation cars, loaded or unloaded, at any point on its terminal lines and moving same to any other point on its said terminal lines, and delivering same to any person, firm or corporation, where the moving thereof from said initial point to said delivery point is entirely over the lines of the Terminal Railroad Association. It is to the part of the decree prohibiting this service to appellants and to the 519 other industries similarly situated that these appellants object, and it is for the purpose of correcting the decree in this particular that these appellants have appealed.

We have said that in our view the opinion of this court in the case of United States of America v. Terminal Railroad Association, *supra*, is so clear that

there ought to be no difficulty in fashioning a decree in accordance with the terms and provisions of said opinion. Be that as it may, the record shows that the circuit judges, sitting in the District Court, who were required by the mandate of this court to fashion and form this decree, labored over the same for many months and that many differences of opinion existed, and still exist, among these judges as to what the form of this decree should be, and that even when the final decree was at last entered it had not the support of all the circuit judges as to its being a correct interpretation of the views of this court, but was clearly a compromise decree. When entered, the decree did not satisfy the Government as being a proper interpretation of the views of this court, and the Government took an appeal for the purpose of having said decree modified. The final decree did not meet the approval of counsel for the Terminal Railroad Association and they have taken an appeal for the purpose of having said decree modified and changed so as to conform with what they consider a proper interpretation of the opinion of this court.

It appears from the record in this case and the opinion of this court that at no time was the attention of either the lower or the appellate court called to the fact that there were persons situated on the lines of the Terminal Railroad Association who required the movement of freight from one point on its lines to other

points on its lines. In the opinion of this court, 224 U. S., *l. c.*, page 407, it said:

> "Indeed, the defense to this proceeding is based upon the insistence that the Terminal Company is solely engaged in operating terminal facilities defined in the briefs as 'mechanical devices for the exchange, receipt and distribution of traffic.' "

Hence this Court did not know, and the District Court did not know when it entered the final decree prohibiting the moving of freight by the Terminal Association from one point on its lines to another that it was striking a deadly blow at a vast number of great industries which, relying upon the charter and ordinance obligations of the Terminal Railroad Association and the long custom existing in the transaction of its business, had located their industries upon the lines of the Terminal Railroad Association. Had they done so, beyond question, no such prohibition would have been included in the final decree. In view of the vital interest which these appellants have in the modification of this decree; in view of the fact that this decree was entered without either this court or the District Court having any knowledge of the course of business referred to, and the doing of which is absolutely essential to the life of one of these appellants and to some or all of the other industries similarly located and is vital to the success of all of them; in view of the fact that

the transportation prohibited is not competitive with any other railroad and is entirely intrastate; in view of the fact that said decree overrides and nullifies the charter obligations of the Terminal Railroad Association, and also overrides and nullifies its ordinance obligations; in view of the fact that the transportation prohibited by said final decree, and heretofore done by the Terminal Railroad Association for appellants and others similarly situated, can, in no possible way, under the conditions existing and shown by the record, further an illegal combination; in view of the fact that if the decree had drastically enforced the provisions of the Sherman Anti-Trust Act and dissolved the Terminal Railroad Association into its constituent parts, it would have been a business which each constituent part could have continued to do and perform under its charter and under its ordinance obligation; and in view of the fact that it would be grossly inequitable and unjust to the appellants and the many other local industries similarly situated, whose very life is threatened in many cases, whose business is practically destroyed in many cases, and whose business would be totally destroyed in many cases; we appear before this court, which now has before it the question of properly interpreting its opinion and of formulating the decree which it intended should be formulated thereunder and ask

that our interests be protected by a proper modification of the decree of the District Court.

We care not whether we be considered as interveners below appealing to this court or as interveners appearing as original interveners here, or as having a hearing in this court by counsel acting as *amicus curiae*, for we know that this court, with the facts before it, and acting as the high court of chancery in the administration of justice, will willingly hear our plea and will not close its eyes nor shut its ears to any facts which may throw light upon the situation and which will aid it in carrying out the golden rule of equity jurisprudence—that right and justice must prevail before all else, and that a court of equity will never lend itself to work an injustice upon any man when, by its decree, it may protect the rights of every man and do injustice to none. Even if these appellants had no standing before this court from a technical standpoint, yet if they could bring to the knowledge of this court facts which show that any proposed action which it was sought to have this court take would be grossly inequitable and unjust as to them, this court would not shut its eyes to those facts, but would gladly receive any information which would throw light upon any proposed action it was requested to take.

As we have said, the law of this case will be found in the decision of the Supreme Court of the United States

in United States v. Terminal Railroad Association, 224 U. S. 383 (56 Law Ed. 810). Our endeavor will be to apply the principles as enunciated in the decision of the Supreme Court to the facts set forth and shown in the intervening petitions and show to this court that under that decision a grievous wrong has been done to the intervening petitioners, and that the modification of the final decree of the District Court as prayed in the petition of interveners should be granted, and that the granting of such change in the said final decree as heretofore entered will not only not be inconsistent with what is laid down by the Supreme Court in its decision, but will not be inconsistent with the specific directions in regard to the form of the decree which the Supreme Court directed should be entered in this case.

It is apparent, from a reading of the decision of the Supreme Court, that neither the trial court nor the Supreme Court had ever had called to its attention the movement of freight and traffic over the Terminal Railroad Association such as that done by the Terminal Association for intervening petitioners herein. Undoubtedly, at the trial of this case, the Terminal Association was fighting for its very existence, and the main burden of its defense was based upon the proposition that it—the Terminal Railroad Association—was solely engaged in operating terminal facilities and nothing else. In fact, on page 407 of its opinion, the

Supreme Court says this in so many words; the exact language used by the Supreme Court being as follows:

> "Indeed, the defense to this proceeding is based upon the insistence that the Terminal Company is solely engaged in operating terminal facilities defined in the briefs as 'mechanical devices for the exchange, receipt and distribution of traffic.' "

We do not mean to intimate or to suggest that in making this contention the Terminal Railroad Association was actuated by any unfair motive. Doubtless it looked upon the business such as it was doing for interveners as purely incidental and as being purely a switching service and therefore as one in nowise coming within the prohibition of the statutes; and, further, that since under its charter and under the obligations assumed by it under the ordinances giving it the right to use the streets of the City of St. Louis, it was obligated to do this business; and since the doing of this particular line of business in which appellants are interested in nowise entered into the controversy, it was but natural that it should be kept in the background; hence we find no reference to this phase of the movement of traffic in the opinion of the Supreme Court. That opinion first discusses and sets forth elaborately the organization of the Terminal Railroad Association. It analyzes the agreements out of which the consolidation grew; it discusses the organization and development of terminal associations or systems and

why the development and growth of such systems are beneficial when properly administered; it quotes from the decision rendered by the Supreme Court of Missouri in the case of State *ex inf.* v. Terminal Railroad Association, 182 Mo. 284, to show that under the peculiar conditions existing in the City of St. Louis the unification of the various independent terminal facilities was permissible even under the drastic anti-consolidation provision of the Constitution of the State of Missouri; it then finds as a matter of law that the Terminal Association as operated in the City of St. Louis was in contravention of what is commonly known as the Sherman Act, and gives the reasons, and we must look to these reasons in determining and ascertaining just what the full force and effect of this decision is. The reasons, briefly stated, of the Supreme Court for holding the Terminal Association "a bad trust" are:

First, because under its terms of organization no other railroad could come into the association and have the benefit of the terminal facilities except by the unanimous consent of all the then proprietary lines.

Second, because of the arbitrary, which the court held to be discriminatory and extortionate.

Third, because of the practice of re-billing from East St. Louis to St. Louis and making a distinct hauling charge from East St. Louis to the City of St. Louis.

These, and these only, are the things which the Su-

preme Court found to be unlawful, and these, and these only, are the things which, in the opinion of the Supreme Court, brought the Terminal Association within the terms of the Sherman Act. Excepting for these things, the court not only intimates, but plainly states, the organization would have been legal. On page 410 of its opinion (56 Law Ed. 819), the opinion reads:

> "Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what it is claimed for it—a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated, and the obvious advantages of unification preserved, such a modification of the agreement between the Terminal Company and the proprietary companies as shall constitute the former the *bona fide* agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration, to which we have referred, will amply vindicate the wise purpose of the statute and will preserve to the public a system of great public advantage."

The decision then lays down what the terms of the decree shall be, which, according to the opinion of the Supreme Court, would transform the defendant from a "bad" to a "good" combination. The opinion states

specifically what the decree shall contain; it provides that the decree shall cover the following points:

First, it shall provide for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties.

Second, it shall provide for a plan of re-organization of the Terminal Association which shall definitely provide for the use of the terminal facilities of the association by any other railroad not electing to become a joint owner.

Third, it shall provide for eliminating from the then existing agreement between the Terminal Company and the proprietary companies any provision which restricts any such company to the use of the facilities of the Terminal Company.

Fourth, it shall provide for the complete abolition of the practice of billing to East St. Louis and then re-billing traffic destined to St. Louis or points beyond.

Fifth, it shall provide for the abolition of any special or so-called arbitrary charge for the use of the Terminal facilities in respect to traffic originating within the so-called hundred-mile area that is not equally applied to all other traffic of a like character.

Sixth, it shall provide that any disagreement between any company applying to become a joint owner or user and the Terminal Association which shall arise after a final decree may be submitted to the District Court.

Seventh, it shall contain a provision that nothing

therein shall in anywise, or at any time, affect the power of the Interstate Commerce Commission over rates to be charged by the Terminal Company.

These are the seven points which the opinion of the Supreme Court directed should be specifically covered, but the decree, as now drawn, **adds an eighth point not** required by the opinion of the Supreme Court, and which would, if enforced, produce the conditions of which these intervening petitioners have complained.

The Supreme Court said in its opinion, on page 409 thereof:

> "We come now to the remedy: In determining what this should be we, as said by this court in Standard Oil Company v. United States, 221 U. S. 1, 78, must not overlook the fact that in applying a remedy 'injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce, is the foundation upon which the prohibitions of the statute rests, and moreover that one of the fundamental purposes of the statutes is to protect and not to destroy rights of property.' "

Now, the decree entered by the District Court under the mandate of the Supreme Court based upon the opinion of the Supreme Court when this case was before it, strictly follows the form of the decree specified and provided for in the decision of the Supreme Court, saving and excepting in the first paragraph thereof; and this is the paragraph under which these intervening

petitioners will suffer irreparable injury unless the terms thereof are modified and changed as prayed herein. By the terms of this section, the Terminal Railroad Association is "**perpetually enjoined from in anywise managing or conducting the said Terminal Railroad Association, or any of its constituent companies, and from operating any of the properties belonging to it or its constituents otherwise than as terminal facilities for the railroad companies using the same.**" And may continue as a lawful unification of terminal facilities "**upon abandoning all operating methods and charges as and for railroad transportation and confining itself to the transaction of a terminal business such as supplying and operating facilities for the interchange of traffic between railroads.**" If this language be given a literal construction, the Terminal Association would thereby be enjoined and prohibited from performing the services for petitioners of moving cars from one point on the Terminal to another point on the Terminal, even though such movement was entirely intrastate, was non-competitive with any railroad constituting one of the proprietary lines in said association or with any other railroad. This would not be a serious matter with the Terminal Railroad Association because if this prohibition were enforced as to it and its revenue fell below the required amount necessary to meet expenses and pay interest charges, all that it would have to do would be to make an assessment upon

the proprietary lines sufficient to make up this deficiency; but to these intervening petitioners—the Union Sand & Material Company, the Evens & Howard Fire Brick Company, and the five hundred and nineteen other industrial interests affected by this decree if literally enforced—it would be a crushing blow. The brick company would be compelled to shut down; the sand company would be unable to deliver a vast quantity of its product; the five hundred and nineteen other industries would be cut off from the handling of twenty-six thousand loaded cars a year, and not only that, but the general public would suffer great inconvenience and loss. To state these facts is to show the seriousness of the position which must be apparent at a glance.

For, under present methods of doing business, there is no way in which the damage could be obviated. It would be impossible to move the vast amount of freight now carried in the more than thirty thousand cars by wagon transportation, for the expense and delay would be prohibitory. The only other possible way of moving this freight would be by a system of consigning the cars, first to some railroad company, and then re-consigning them to the point on the Terminal System to which they were originally intended, but this would not be a practical solution, for it would greatly increase the cost, it would very greatly extend the time for deliveries, and, after all, would be merely a technical evasion of the terms of the decree as the same now

stands. Further than that, if the decree as now entered stands it nullifies the charter obligations and the ordinance obligations of the constituent members which go to form the present Terminal Association and brings to naught those wise provisions of the charter and the ordinances under which the constituent members of the Terminal Association were granted rights in and over the streets of the City of St. Louis whereby they obligated themselves to receive from any person, firm or corporation that shall have connection with its tracks within the City of St. Louis any and all loaded and empty cars, and agreed to deliver said cars to any other person, firm or corporation that shall have connection with its tracks and agreed to move such cars, loaded or unloaded, from the point received to any other point on its line of railway without discrimination or delay, at and for a sum of money not to exceed one dollar for each loaded car so moved from any point on the line of said Terminal to any other point on the line of said Terminal; and it nullifies and brings to naught the rights of the various persons, corporations and industries which, relying upon such charter and ordinance obligations of the constituent companies that go to form the Terminal Association, have invested their money in large industrial plants on the line of said Terminal Association, the very life and being of which is dependent upon the carrying out

and the fulfillment of said obligations by the Terminal Railroad Association.

And further than that, it seems to us that it logically resolves itself into this: That what the constituent units which go to form the Terminal Association could lawfully do; that what they were legally obligated to do, both at common law and under their charter and ordinance obligations, they are now prohibited from doing when combined into one corporation, and careful provisions of the state law and of the city ordinances, made for the purpose of protecting its citizens against oppression and injustice on the part of terminal companies to which have been granted valuable public franchises, are brought to naught by the form of the decree which has been entered in this cause. We cannot think that such was the purpose or intention of the Supreme Court, and we feel sure that the situation as it actually exists, so far as the interests of the intervening petitioners are concerned, was never brought to the attention or knowledge of the Supreme Court.

When this court came to the conclusion that the Terminal Association, as then operated, was being operated in contravention to the Sherman Act, it did not apply drastic treatment in the way of punishment, for it recognized that at the basis of the whole thing lay the question of what was for the public good. It recognized that the unification of terminals was, gener-

ally speaking, a good thing for a city for reasons stated in the opinion of the court and for reasons stated in the excerpt from the opinion of the Supreme Court of Missouri in 182 Mo. 284, and it said that in applying the remedy **"injury to the public by the prevention of undue restraint or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rests, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."** And so we say that the opinion of this court did not demand or require the entering of the first paragraph of the decree entered herein in the words and in the form in which it has been entered by the District Court; that to modify and alter said paragraph of the decree, as prayed by the intervening petitioners, would not be any infringement of the duty and obedience which the District Court owed to this court, nor would it be any departure from a strict enforcement of all the terms and conditions laid down by this court to govern the form of decree to be entered in said cause, but, on the contrary, in our opinion, to enter the decree in the form in which it now stands is at variance with the doctrine laid down by the Supreme Court in the Standard Oil case and in the case against the Terminal Railroad Association, to-wit: **"That one of the fundamental purposes of the statute is to protect and not destroy rights of property."**

In view of the conditions shown to exist in connec-

tion with the movement of cars of intervening petitioners, we respectfully submit that the final decree entered in this cause by the District Court should be altered, amended and changed as prayed in the intervening petitions filed herein, and we would suggest that said amendment and change of said decree be made in the following manner:

By adding a proviso to paragraph 1 of said decree substantially to the following effect:

> "Provided, however, that nothing contained in this decree shall be so construed as to prohibit the Terminal Railroad Association of St. Louis from receiving from any person, firm or corporation cars, loaded or unloaded, at any point on its terminal lines and moving same to any other point on its said terminal lines and there delivering same to any person, firm or corporation, even though the moving thereof from said initial point to said delivery point be entirely over the lines of the Terminal Railroad Association."

Or else, if the decree be entirely redrafted in this court, that it be so drafted as not only to preserve the rights of these appellants and others similarly situated, so that the Terminal Railroad Association may continue to perform the services for said appellants and such other persons as it is, and has been, rendering for many years past, but that the terms of said decree be so drafted that appellants and others similarly situated

may be entitled to demand and require of said association the continued performance of said services.

Respectfully submitted,

John F. Lee

Geo. M. Black

Solicitors for Appellants.

MAPS
TOO
LARGE
FOR
FILMING

No. 567.

SUPREME COURT OF THE UNITED STATES

October Term, 1914.

EVENS & HOWARD FIRE BRICK COMPANY,
Appellant,

vs.

THE UNITED STATES,

PETITION FOR INTERVENTION.

Appeal from the District Court of the United States for the Eastern District of Missouri.

STATEMENT.

We submit jointly for convenience the motion to consolidate and the right of petitioners to intervene in one Statement and Brief.

The United States is complainant in this case. It is conservator of the public interest and welfare and it speaks for the public.

The petitioners cannot intrude into this litigation to protect the public interest or as "*Amici Curiae*" so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion.

The Government through its legal representative appeared in the court below and appears here disapproving and objecting to the filing of the intervenors' petition. The petitioners can, therefore, intervene only for the protection of their *own individual interests.*

This court being familiar with the litigation knows that the general object of the original suit was to break the combination of the fourteen defendant railroad carriers which controlled interstate commerce at the St. Louis, Mo., railway gateway.

The allegation in the bill and prayer in the case shows the above statement as to the object of suit is correct. (See Abstracts of pleading and evidence in original case No. 386, October Term, 1911, of this court, pp. 34-45.)

The effort to intervene in this case is for the purpose of procuring this court to decide the defendants can operate the jointly owned terminal facilities at the St. Louis, Mo., railway gateway as a railroad transportation property. In the opinion handed down by this court, April 22, 1912, the court expressly held that it would permit the continuance of the joint ownership of the three combined terminal properties by defendants only on the condition that *defendants immediately cease operating said three properties as a railroad transportation com-*

pany and operate same only as a terminal company, which defendants at the time claimed and this court found they were not doing. Therefore, this attempted intervention is for the purpose of procuring in this case after entry of final decree a re-hearing on a question already decided. The defendants were charged by the Government with being *a combination of railroads carrying on interstate* transportation and defendants denied the charge and defended the combination on the ground that the Terminal Railroad Association was only used *by defendants as terminal facilities* and not as a railroad transportation company. But this court found defendants had been acting as a *railroad transportation* company and ordered such use of *the combined properties stopped.* Defendants themselves are, therefore precluded from coming into court in this case and taking the position that they are a transportation company. This court has passed on the right of defendants to act as a transportation company in the operation of the three combined *terminal properties and denied it.* Intervenors seek to reopen that question. Intervenors should not be allowed to re-try this case for the purpose of obtaining a modification of the decree by incorporating therein an order which in legal effect would be *contrary to and nullify* the finding and *decision of the court heretofore made in this case.*

Petitioners seek by intervention to impeach the decree by altering it so as to allow instead of prohibit, as it now does, defendants to operate the three combined terminal properties as a railroad transportation company.

The intervenors thus seek to come into this court subsequent to rendition of decree and overthrow the decree by intervention, and the foundation of their right is based on the proposition that *defendants should be ordered to continue in the future as in the past to operate the three combined terminal properties as a railroad transportation company* as distinct from a terminal company in hauling freight offered by petitioners. If this claim of petitioners has any foundation legally it can only arise from the fact that under the law the defendants must operate the three combined terminal properties, Wiggins, Merchants and Terminal Railroad Association properties *as a railroad transportation company and not merely as terminal properties for interchange of traffic between railroad carriers.* If it is legally true that defendants must so operate said three properties as a transportation company, and in the future the defendants should refuse so to do (bear in mind there is no allegation in interventors' petition that defendants have now defused) and refuse to accept freight offered to be transported over the three combined properties as a transportation company, petitioners' remedy by an independent action is very plain and clear. If the shipment, whether intra- or interstate, is offered and refused, if defendants bound to carry as transportation company, an adequate and speedy remedy can be applied for in proper court and obtained by petitioners immediately because all railroad *companies acting as transportation companies for hire owe a duty to carry for all.*

If intervenors *have another adequate remedy* clearly

they cannot intervene *here after decree* in lower court. The petitioners seek after entry of *decree to impeach* same by overthrowing and altering it. This they can only do by *an independent proceeding and not by intervention.*

Again, the statements in *intervenors' petition shows the petitioners seek prevention* of possible proposed future action by defendants under the decree, for the allegation is that "a very grave and irreparable injury would be done to it, if by the terms of the decree entered in this cause the Terminal Association were precluded and enjoined from *continuing* (Underscoring our own) to move its clay from said mine to said plant. or move the empty cars of this petitioner from said plaint to said mine."

We submit in the instant suit no one other than the United States, *the complainant* herein, can raise the question as to whether or not a *proposed* action in the *future* would or would not violate the spirit and purpose of the decree, and as petitioners are strangers to the record in this case they cannot be allowed to raise the question by intervention of the legality or illegality of proposed *action* under the decree herein as the petitioners could litigate and determine in an independent suit between defendants and themselves the legality or illegality of any action defendants might take in the *future with reference to the refusal to accept and transport freight offered by petitioners* and therefore petitioners should not be allowed to intervene in this case.

This suit was begun in 1905 in the District Court of the United States of the Eastern Division for the Eastern District of Missouri and is a proceeding to enforce

the provisions of the Sherman Anti-Trust Act against fedendants; issues of facts were made by the pleadings and a Commissioner was appointed to take the testimony and he reported the same to the court without any findings either as to law or facts, and the case was submitted before the four Circuit Judges of the United States Court of Appeals, and the judges being equally divided in opinion as to whether or not the Government was entitled to relief they certified the case to this court, where upon motion made by Government on January 31, 1910, the cause was remanded because no final judgment had been entered below.

On June 6, 1910, Government filed in lower court a motion asking for re-argument of said cause.

Afterwards four Circuit Judges made an order deciding that the plaintiff could not prevail because only two of the judges were of the opinion that the complainant was entitled to relief, while two were of the opinion it was entitled to no relief, and the court denied the motion and dismissed the bill of complaint.

Afterwards, on August 1, 1910, petition for appeal was duly filed and in proper time and manner appeal was perfected to this court, and the case was argued on testimony taken and case submitted here on October 20 and 23, 1911, and opinion handed down April 22, 1912, therein reversing the decree of the lower court dismissing the bill and declaring defendants an illegal combination under the Anti-Trust Act.

On May 23, mandate of this court was issued, and on June 3, 1912, the Government filed a motion for the entry of a decree in pursuance of mandate of the Supreme Court and accompanied the same with a proposed in-

terlocutory decree. Controversy arose as to entry of this decree, which resulted in prohibition proceedings in which this court held that district judge sitting alone in the District Court could not enter the decree in this case, but must be entered by Court of Appeals Judges sitting in the District Court.

On March 2, 1914, the Circuit Judges sitting in the District Court entered a final decree in this cause in pursuance of the mandate of this court, and on March 27, 1912, complainant appealed to this court.

On April 12, 1914, complainants, intervenors herein, filed a motion in same cause asking leave to intervene, which was denied by lower court. The intervenors then appealed.

Petition of intervenors specifically alleges the business carried on by defendants for petitioners is that of *a railroad transportation company.* The intervenors then ask that the decree be modified so that the defendants may act as a railroad transportation company for petitioners and five hundred and twenty-one other persons and industries.

This court found that the *fourteen defendant roads* could not legally use *the combined* terminal properties as a *railroad transportation company,* because so to do would be to violate the Sherman law prohibiting, as interpreted by this court, the consolidation of parallel and competing railroad carriers. Therefore, to ask the court to so alter and change the decree is for intervenors to directly contest *the general object* of the Gov-

ernment suit, which as *intervenors petitioners cannot do.*

The intervenors, after decree entered, are seeking to impeach the validity of the decree, and this cannot be done by intervention but only by an original suit.

The intervenors seek to have legalized, transportation by defendants, over the three combined Terminal properties, as railroad common carriers. Intervenors cannot try by intervention the issue between defendants and themselves as to whether or not the defendants can be compelled to transport freight for intervenors as a railroad common carrier. If *intervenors have* such a right it can be *asserted in an independent action.* If intervenors are coming in as complainants their petition must be in subordination to and in recognition of the propriety of the main proceeding. Intervenors herein contest the general object of the suit. If intervenors come in as defendants they cannot assert any claim the defendants could not assert. But intervenors herein set out the fact that they have acquired property on assumption defendants had the right to act as a common carrier and were induced to buy a clay mine because they believed defendants could act as a railroad common carrier.

If defendants had plead these facts as a defense to the charge they were restraining commerce this court would not have listened to the defense, and if defendants could not set up defense above mentioned the intervenors cannot make the facts a basis for intervention. The intervening petition fails to disclose peti-

tioner owned fire clay mines before this suit was brought. This should be shown *because if acquired* pending this action *intervenors* should have no *right to intervene.*

The allegation of the intervening petitioners about being informed as to *what defendants* have done or are about to do as to *filing petition to show* other persons similarly situated as intervenors is *idle and wholly useless* and need not be noticed. Intervenors are not *guardians of the public welfare* and presumably at least not especially representing the interests of the defendants.

Intervenors fail to state defendants have refused to transport as a railroad common carrier the clay mentioned in intervenors' petition.

The intervention petition herein raises issues of fact and, of course, this court will not after a decision of the case and the entry of a final decree in the lower court assume at suggestion of intervenor the functions of a trial court to try an original case wherein is involved issues of fact.

The petition of intervenors does not show they were not guilty of laches in filing the petition, but the record in this case shows intervenors were *guilty of gross laches.* This litigation had been going on *for eight years* before intervenors acted and was a matter of common knowledge because the newspapers in recording current events had for said time of eight years been giving a *great deal of publicity to this case.*

The petition of intervenors does not even notify this court, except inferentially, that this was a proceeding

by the Government under the Federal Anti-Trust Act.

This petition should not be considered in this court (as intervenors in their brief seek to have done) as an original petition filed in this court because the intervenors have *been guilty of laches in waiting* until after the *final decree* was entered and because the petition of intrevention filed after entry of final decree seeks to impeach the decree and to re-try the issue originally tried between the Government and the defendants, and also seeks to try and have *adjudged as between the defendants and intervenors* a controversy that petitioners *allege inferentially may arise* in the future as to whether or not the defendants could legally be compelled *to carry as a railroad common carrier* the fire clay of intervenors from the clay mine to their plant and complainant submits this question is not properly triable in an intervention proceeding and therefore by reason of the foregoing facts intervenors' motion to consolidate should be overruled and intervenors' petition denied if considered as an original petition, and if considered as a proceeding on appeal that the action of the lower court refusing intervention to petitioners should be affirmed.

BRIEF.

I.

The United States is complainant in this case and it is the conservator of the public welfare and has a right to speak for the public. Intervenors cannot intrude in this case merely to protect public intrest so long as Government is present by its Attorney General protesting against such intrusion. To allow such intrusion would be wresting from the Government that control over litigation which it has a right to exercise. The petitioners can intervene only for the protection of their individual interset.

United States v. Northern Securities Co., 128 Federal R., Loc. Cit., p. 812.

II.

In an anti-trust proceeding to restrain and prevent a combination in violation of Sherman Law the court will not permit an intervention by private individual over the objection of the Attorney General for the purpose of obtaining a modification of the decree by incorporating therein an order which in legal effect would be contrary to the finding and decision of the court theretofore made in the case.

United States v. Northern Securities Co., 128 Federal R., p. 808.

III.

Intervenors were guilty of gross laches in not filing petition earlier as case had been in court eight years and opinion of court had been rendered and mandate issued almost two years before petition of intervenors was filed.

Foster's Federal Practice (5th Ed.), Vol I, Sec. 258, p. 831.

Barton Safe Deposit Co. v. Rapid Tel. Co., 67 F., p. 165.

State Trust Co. v. K. C. P. & G. R. R. Co., 120 Federal R., p. 308.

United States v. McGee, 171 Federal R., p. 209.

IV.

The intervening petition filed after final decree in lower court attacks and attempts to impeach the decree. The intervenors seek to impeach the decree by altering it so as *to deprive it of power to prevent fourteen defendants from operating the jointly owned Terminal Railroad Association as a transportation company and railroad common carrier. Intervenors* seek in this way to overthrow *the decree although they come into court subsequent to its rendition. An intervenor, after final decree, cannot impeach the validity of the decree.*

State Trust Co. v. K. C. P. & G. R. R. Co., 120 F. 308.

United States v. Northern Securities Co., 128 F. 809.

United States v. McGee, 171 Fed., p. 209.

V.

Intervention will not be allowed after submission of cause and its decision and entry of final decree.

Foster's Federal Practice, Vol. 1 (5th Ed.), Sec. 258, p. 830.

United States v. McGee, 171 Federal R., Loc. Cit., p. 213.

VI.

The lower court had no authority to allow intervention by the petitioners because an appeal had been perfected before the intervening pettition had been filed.

Broson v. LaCrosse, 1 Wall. 405-409.

Burnham v. North Chicago Street Ry., 87 Federal R., p. 168.

VII.

The intervention if made by petitioners as complainants must be made in subordination to the main case.

Equity Rule 37.

Foster's Federal Practice, Vol. 1 (5th Ed.), Sec. 259, p. 838.

VIII.

Petioners necessarily *must found their right* to have defendants *accept freight* and carry same as a Transportation Co. over *combined jointly owned* properties of Wiggins, Merchants and Terminal Association Companies on contention that defendants can

legally operate the three properties named as a railroad *transportation* company, and this court having *decided defendants could not legally* operate three above mentioned combined properties as a railroad *transportation* company, necessarily the relief asked for by petitioners that defendants be compelled to so operate said properties *as a transportation company* manifestly would *impeach* the decree and thus overthrow it although petitioners are strangers to the record and came into court *subsequent* to the rendition of the decree and as they can readily enforce by an original independent proceeding the right, if any which they claim to possess to compel defendants to use combined terminal properties *as a transportation company,* petitioners should not be allowed to intervene.

State Trust Co. v. K. C. & P. E. R. R. Co., 120 Fed. eral R., Loc. Cit., pp. 407, 408.

Louisville & Nashville R. R. Co. v. Cook Brewing Co., 223 W. S. R., p. 69, 56 L. Ed., p. 355.

IX.

Petitioners in their petition pray for relief against possible proposed future action under decree by defendants and therefore present a possible future question that might arise between petitioners and defendants and which question as to the *right* of defendants *to refuse to accept freight for transportation* as a railway company to be carried over three combined jointly owned terminal properties is a matter which *could* properly be litigated and *determined in an independent*

suit between defendants and petitioners and hence cannot be raised by intervening petition in this case. The petitioners are strangers to the record and cannot raise in this case the question as to whether or *not proposed future action of defendants would or would not violate the already entered decree.* In the instant suit the *United States* is the only one that *could* raise the question as to whether or not a proposed action was illegal or in violation of the spirit and purpose of the decree.

United States v. Northern Securities Co., 128 Federal R., p. 808.

ARGUMENT.

Intervenors in their petitions charge defendants are *now* and have been operating the Terminal Railroad Association of St. Louis as a Railroad Transportation Co. (See Printed Record in case 467 containing copy of Intervenors' petitions.)

The Government in the original bill charged and proved and this court found defendants were operating the Terminal Railroad Association of St. Louis, Mo., as a Transportation Company. This court decided that the operation of the Terminal Railroad Association as a Transportation Company by the fourteen defendants was a violation of the Sherman Anti-Trust Act and that defendants must cease to so operate said properties and confine the operation thereof to Terminal uses only.

Intervenors now *after entry of final decree* come into court as *strangers to the record* and ask the court to *alter* the decree in an *intervention* proceeding and to make an order compelling the defendants in the future to operate the three combined and jointly owned railroad companies, to-wit: Wiggins, Terminal Association and Merchants Co. as a *railroad transportation company.*

The intervenors' right to relief sought is founded on the claim that defendants should be compelled to operate the combined Terminal properties *as a Railroad Transportation commmon* carrier; intervenors asking

for this relief on the ground that defendants *now are and in the past* have been operating the three above mentioned jointly owned combined Terminal properties *as a Transportation Company,* and seeking an order from this court compelling defendants to continue *in the future* to so operate as a *Railroad Transportation Company, said properties,* they manifestly *seek to impeach* the *already entered decree by depriving* it of the effect of a decree *preventing operation* of said properties as a Railroad *Transportation* Company which it was intended to have. Intervenors' petition proves defendants are *now* operating and *have been* since, and *were before the rendition* of the opinion in this case, operating the combined Terminal properties as a *Railroad Transportation Company,* in direct violation of the *decision* of this court and of the *decree* entered in the court below.

Intervenors' petitions allege they are now in conjunction with defendants, using the above mentioned combined Terminal properties as a Railroad Transportation Company in direct violation of the already entered decree of the lower court, and in so doing petitioners and defendants are not conforming to the *opinion of this court as interpreted by the Judges of the Circuit Court of Appeals.*

We respectfully submit that at least the petitioners should show they are complying with the interpretation of the opinion of this court by the lower court pending a proposed hearing to establish any rights they claim are being violated by the entered decree.

The allegations in the petitions showing the de-

fendant *are now* and always have been operating the combined Terminal properties as a Transportation Company, place the defendants in the attitude of having claimed in this court that they were only using the *combined properties* as *Terminal* properties while in fact they were then using them as a Railroad Transportation Co.

The fact that many industries were located on these tracks and that passenger trains were run by defendants as a regular Railroad Transportation Company runs trains was all proven by the Government in the original hearing, and this testimony was all before this court when the opinion was written in the case.

The *defendants knew* all about the fact that they were using the three combined Terminal properties *as a Transportation Co.*, to carry freight for petitioners and the several hundred other industries mentioned in Intervenors' petitions when the case was here for argument and decision before; and petitioners also knew the same facts. That was three years ago. Defendants *knew* and petitioners *should have known* defendants *were charged by the Government* with violating the Sherman Law by operating the combined properties as a Railroad Transportation Co., and neither petitioners nor defendants should *now* be heard to say that the case should be practically retried to enable petitioners to settle the relationship that should exist between defendants and petitioners. Petitioners must found their rights on the claim that defendants are a *Railroad Transportation Co.* as *distinguished from a mere Terminal Company.* If petitioners' claim is correct, then petitioners *can institute an*

independent action and compel defendants *to continue to carry freight for them as a Railroad Transportation Company.* Therefore, on *petitioners' own theory they have no standing as interveners in this case. Petitioners must stand or fall on the clear cut issue that defendants can or cannot operate* the three combined *Terminal properties as a Railroad Transportation Co.*

The decision of this court was decisive that defendants *could not* operate the said combined Terminal properties as a Railroad Transportation Co., and that if defendants did not discontinue operating said properties as a railroad company and use same only as Terminal properties, the court would dissolve the combination because it was, as then operated, illegal, and a monopoly.

The court said to defendants: "You can exist only as a Terminal Co." Petitioners now seek to have defendants allowed to exist as a Railroad Transportation Co. as well as a Terminal Co., and the only reason advanced why the *special dispensation* as to petitioners should be made is that petitioners were induced to buy property and conduct a business under the mistaken belief that *defendants could combine and monopolize all the Terminal facilities at St. Louis, Mo., and operate the same as a Railroad Transportation Co.* The law must apply to all alike and no exception can be made because of peculiar conditions surrounding some individuals and their business.

The use as a Transportation Company of the property of the three combined companies by defendants to carry the freight sought to be transported by petition-

ers *necessarily involves the use of the combined properties,* and therefore this is illegal.

It is no answer to say, as petitioners declare, that "None of the business so being moved by the said Association for these petitioners over its own lines was competitive with any railroad constituting one of the proprietary lines in said Association, or with any other railroad," because the fact remains to handle petitioners' business, the combined property and agency of fourteen railroads, to-wit: the Terminal Railroad Association of St. Louis, Mo., and its property is used to carry *on Railroad Transportation* business and this is illegal.

The defendants cannot be at the same *time a Terminal Co.,* only when defending itself in this court, and be actually a railroad *transportation company monopolizing* the interstate commerce of St. Louis. The remainder of the time, defendants must be either a Terminal Co. only, both here and in St. Louis, or a Railroad Transportation Co., both in this court and in the actual business world at St. Louis, Mo.

To petitioners and the transportation world at St. Louis, defendants appear as operating *the Terminal Railroad* Association as a *Railroad Transportation* Company, and to the court, when arraigned at the bar of justice to answer for infraction of the law so far as a lifeless, fleshless corporate entity can be made to answer, defendants seek to appear as operating the Terminal Railroad Association of St. Louis, as *a mere terminal facility only,* and not otherwise.

When the Terminal Railroad Association of St. Louis is haled into court, it vanishes as a *Railroad Transportation Co.,* like the childish vision of a dream, and in place of a corporate culprit, lo! there appears at this bar a public benefactor in the guise of the Terminal Railroad Association of St. Louis, as a *"Mere mechanical device used only for exchange of traffic between railroads, and operated solely as a Terminal facility."*

No matter in what light defendants may appear to petitioners, whether as a *Railroad Transportation Co.,* operating as such the combined Terminal properties or as a *mere Terminal Co. only,* the defendants stand before this court and the law stripped of all privileges so far as the Terminal Railroad Association is concerned except *the one privilege of operating said Terminal Association as a combined, jointly owned property of defendants solely as a Terminal Co., and not otherwise,* and no suppositions or presumptions or mistakes of petitioners or others can or should be allowed to permit defendants to continue the violation of law by operating the said properties as a Railroad Transportation Co.

The petitioners, if they have any rights, can protect them in an independent suit. The petitioners in the instant suit cannot intervene after entry of the decree to impeach the decree by altering it so as to change its intended effect of prohibiting the defendants from operating the combined Terminal properties as a Transportation Co. *This can only be done in an independent suit.*

POOR COPY

The petitioners have been guilty of laches in standing by for eight years after litigation began and two years after case decided before attempting to assert their rights, if they ever had any, and they should now be barred from *asserting same in this action.*

The petitioners could not intervene in lower court because case had been appealed before they filed their petition. Petitioners cannot come into this court under Section 5 of Anti-trust Act and be heard because they are strangers to the record and are attempting to impeach the decree already rendered by having this court determine the question of the relation and rights of defendants and petitioners as to a shipment of freight or refusal to accept in the future, shipments of freight when offered defendants by petitioners.

The question as to whether or not defendants stand in the relation of a railroad transportation company to petitioners in operating the combined Terminal properties can be litigated in an independent suit between defendants and petitioners.

Therefore the petitioners should be denied th right to intervene here or in the lower court.

Edward C. Carr
Special Asst.
to Attys. Gen'l.